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In the Supreme Court of the United States

OCTOBER TERM, 1966

No. 66

KALMAN J. BERENYI, PETITIONER

v.

DISTRICT DIRECTOR, IMMIGRATION AND NATURALIZATION SERVICE

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE RESPONDENT

OPINION BELOW

The opinion of the court of appeals (R. 303–308) is reported at 352 F. 2d 71. The opinion of the district court (R. 271–277) is reported at 239 F. Supp. 725.

JURISDICTION

The judgment of the court of appeals (R. 308) was entered on November 1, 1965. The petition for a writ of certiorari was filed on January 28, 1966, and was granted on April 18, 1966 (R. 309; 384 U.S. 903). The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

In applying for naturalization as a United States citizen, petitioner testified that he had never been a member of the Communist Party. His petition was denied on the ground that he had given false testimony which, under Section 101(f) of the Immigration and Nationality Act, precluded a finding that he was a person of good moral character. The questions presented are:

1. Whether the finding of the district court that petitioner gave false testimony was clearly erroneous.

2. Whether, if petitioner was a member of the Communist Party, the meaningfulness of his association is relevant to the truthfulness of his testimony.

STATUTES INVOLVED

Section 316(a) of the Immigration and Nationality Act of 1952, 8 U.S.C. 1427(a), provides:

> No person, except as otherwise provided in this subchapter, shall be naturalized unless such petitioner, (1) immediately preceding the date of filing his petition for naturalization has resided continuously, after being lawfully admitted for permanent residence, within the United States for at least five years and during the five years immediately preceding the date of filing his petition has been physically present therein for periods totaling at least half of that time, and who has resided within the State in which the petitioner filed the petition for at least six months, (2) has resided continuously within the United States from the date of the petition up to the time of admission to citizenship, and (3) during all the period referred

to in this subsection has been and still is a person of good moral character, attached to the principles of the Constitution of the United States, and well disposed to the good order and happiness of the United States.

Section 101(f) of the Immigration and Nationality Act, 8 U.S.C. 1101(f) provides in pertinent part:

> For the purposes of this chapter—
>
> No person shall be regarded as, or found to be, a person of good moral character who, during the period for which good moral character is required to be established, is, or was—
>
> * * * * *
>
> (6) one who has given false testimony for the purpose of obtaining any benefits under this chapter;

Section 335(b) of the Immigration and Nationality Act, 8 U.S.C. 1446(b), provides in pertinent part:

> The Attorney General shall designate employees of the Service to conduct preliminary examinations upon petitions for naturalization to any naturalization court and to make recommendations thereon to such court. * * * The record of the preliminary examination authorized by this subsection shall be admissible as evidence in any final hearing conducted by a naturalization court designated in section 1421 of this title.

STATEMENT

On January 30, 1962, petitioner, a Hungarian national, filed a petition for naturalization in the United States District Court for the District of Massachusetts. In his application to file (R. 244) and in the course of preliminary examination pursuant to Sec-

tion 335(b) of the Immigration and Nationality Act (8 U.S.C. 1446(b); R. 252, 299), petitioner denied that, in the United States or any other place, he had been a member of, or in any way connected or associated with the Communist Party, either directly or indirectly. At the final hearing, before the district court, pursuant to Section 336 (8 U.S.C. 1447), the Attorney General appeared by counsel and urged that the petition be denied on the grounds (1) that petitioner had been a member of the Hungarian Communist Party during the preceding ten years, and was therefore ineligible for naturalization under Section 313 of the Act (8 U.S.C. 1424), and (2) that during the five-year period for which he was required to establish good moral character he had testified falsely in denying such membership in order to facilitate his naturalization, and was therefore ineligible for naturalization under Sections 101(f)(6) and 316(a) (8 U.S.C. 1101(f) and 1427(a)). Following the hearing, the district court denied the petition, finding that petitioner had testified falsely to facilitate his naturalization (R. 272–280). The court of appeals affirmed (R. 303–308).

1. At the final hearing the government called two witnesses and, with petitioner's express consent, introduced the record of the preliminary examination as authorized by Section 335(b) of the Act (8 U.S.C. 1446(b)) (R. 4, 7–12).[1]

[1] The papers introduced contained petitioner's application to file a petition for naturalization (R. 243–247), transcripts of the preliminary examinations of Dr. Pal Halasz on September 17, 1964 (R. 157–193), of Dr. Gyorgy Kury on August 21, 1964 (R. 194–233), and of petitioner on July 30, 1963 (R. 234–

The government's principal witness was Dr. Gyorgy Kury, a naturalized citizen of Hungarian birth who lived in Brookline, Massachusetts (R. 38, 195). Dr. Kury testified that he had attended the Budapest Medical University and that from 1946 to 1949 he had been in the same class as petitioner (R. 39, 44–45, 47, 51). During the first two school years Dr. Kury had no contact with petitioner (R. 46–47, 49). In September 1948, the beginning of the third year, the class was divided into small study groups of about twenty students each, primarily for the purpose of reviewing the medical subjects taught in the larger, formal courses (R. 41–42, 47–49, 52–54). Under the pervasive influence of the Communist Party (R. 45), the study groups were also required to discuss the principles of Marxism and Leninism (R. 43, 48, 56–57), and one student in each group served as a leader in ideological and political matters (R. 53). Dr. Kury attended one meeting of the study group to which petitioner belonged. At that meeting petitioner introduced himself as a member of the Communist Party and as the student responsible for the ideological education of the group (R. 42–43, 54). On both direct-examination (R. 42) and cross-examination (R. 54), Dr. Kury recalled that petitioner had said that he had joined the Party after the Soviet troops oc-

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241), transcripts of earlier, ex parte interrogations by INS officers of Dr. Halasz on July 9, 1959 (R. 264–271) and of Dr. Kury on April 14, 1959 (R. 255–263), and four sworn statements by petitioner dated May 22, 1962 (R. 248–254), February 19, 1962 (R. 298–299), January 13, 1959 (R. 291–298), and September 24, 1957 (R. 282–290).

cupied Hungary.[2] After that first meeting, Dr. Kury was transferred to another study group at his own request, and he had no further contact with the group attended by petitioner (R. 56, 57). About a year later he was arrested for attempting to leave Hungary without a passport, was sentenced to twelve months in jail, and was later readmitted to the medical school only after representing that his absence had been caused by illness (R. 59–61). His imprisonment, together with a later illness, placed Dr. Kury two years behind petitioner with whom he had no further contact (R. 61–64).

The other government witness was Dr. Pal Halasz, a naturalized citizen of Hungarian birth, living in Peoria, Illinois (R. 12–13, 159). Dr. Halasz testified that he had attended the Budapest Medical University between 1949 and 1955 (R. 13, 19, 21), and had there known petitioner who was an outstanding student and three years ahead of him (R. 21, 25–26). In 1948 Dr. Halasz joined the Communist Party in response to strong pressures; he remained a member until 1956 (R. 17–18, 21–22, 27). As a Party member, he was required to attend the Party meetings which took place at the medical school about once a month (R. 18–19, 37). Approximately 120 to 150 persons would be in attendance at such meetings (R. 28). Occasionally the meetings would be closed, with only Party members present (R. 30, 33, 37); at other times

[2] Dr. Kury had testified to the same effect at the preliminary hearing before a naturalization examiner (R. 197) and in a sworn ex parte statement to an Immigration Service examiner (R. 258–259).

the meetings would be open to invited non-members as well (R. 28, 31–33, 37). Strong pressures to attend were brought to bear on students with particularly good academic records (R. 24–25, 30, 37–38). Failure to attend could result in withdrawal of state financial support, expulsion from medical school, and possibly imprisonment (R. 24). At one or more of the Party meetings in 1950 or 1951, Dr. Halasz had observed petitioner in attendance (R. 19–20, 31). Dr. Halasz testified that he did not recall if these particular meetings were open or closed (R. 33). Although on a few occasions Dr. Halaz had been assigned to check that those attending a meeting were carrying their Party cards (R. 31), he had never seen a membership card for petitioner (R. 27, 30–31). Nevertheless, from having seen petitioner at meetings, Dr. Halasz had thought that petitioner was a Party member (R. 35). He testified that he did not in fact know whether petitioner was a member or whether he was a non-member who had been invited to attend (R. 33).[3]

[3] Dr. Halasz had testified concerning these meetings on two previous occasions. In 1959, during an ex parte interrogation by an INS officer, he was asked (R. 267–269):

"Q. Did you ever attend a meeting of the Party at which only Communist Party members were allowed?

"A. Yes.

"Q. Did Dr. Berenyi also attend some of these meetings restricted only to Party members?

"A. Yes.

"Q. How many of these meetings would you estimate both of you attended?

"A. Oh, almost every month, between 1951 and 1953 or 1954. To come to think of it, I believe he graduated about 1952 from medical school.

"Q. In other words, while you were both going to medical

He stated that he did not believe petitioner was a Communist at heart, even if he was a member (R. 35). Petitioner had occasionally helped Dr. Halasz with his medical studies (R. 21), in the course of which petitioner had made statements against the Party and the regime (R. 33–35).

2. Petitioner testified in his own behalf. He stated that he had never been a member of the Communist Party (R. 87–88, 90–92, 95), that he had never attended closed meetings of the Party (R. 92–93), that

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school, both you and he attended Communist Party functions at which only Communist Party members could be present?

"A. Yes.

* * * * * * *

"Q. Do you believe or do you have any basis for believing whether Mr. or Mrs. Berenyi were ever genuine Communist Party members from an ideological standpoint?

"A. I believe Mr. Berenyi was only a Communist Party member on paper. He was not a Communist as far as anything in his mind was concerned."

In 1964, at the preliminary examination, Dr. Halasz was questioned by the government attorney (R. 179–180):

"Q. Is it or is it not true that you know of any facts which would indicate that Dr. Kalman Berenyi was a member of the Communist Party?

"A. Yes, I know facts.

"Q. Will you state those facts for us?

"A. Well, as I was a member of the Communist Party I attended Communist Party meetings in the army unit. And when I was there I have seen him, not each time, but I have seen him in the Communist Party meeting. Whether he was a guest, which many times happens in the Communist Party to get him into the Communist Party because he was a leading student in the medical school, and they called him in as a guest or whether he was ever a member, I can't recall. But I have seen him on the meeting, that I can state."

* * * * * * *

he had never been the political leader in a study group (R. 106), and that he had never made any statement such as that attributed to him by Dr. Kury (R. 87–88). Petitioner stated that he had been born in Budapest on August 7, 1928 (R. 87). He was baptized a Roman Catholic, and was given a strict religious upbringing by his mother (R. 87–88). At the time the Soviet troops entered Budapest in 1945, he was a sixteen-year-old high school student living with his parents and was an altar boy for an order of Franciscan nuns (R. 88).

In September, 1946, petitioner entered the Budapest Medical University. The school was not then under Communist Party domination, although there were some Communist groups and organizations. Petitioner did not join any of these organizations (R. 89). By 1948, however, the Communists had taken over the university and were attempting to indoctrinate the students in Communist ideology (R. 93). They held meetings about once a month which were attended by non-Communists as well as Communists (R. 93–94). Attendance by non-Communists was supposedly voluntary, but failure to attend could entail "very serious consequences" (R. 94). Petitioner attended "quite a few" times. At these meetings, if the lecturer directed a question to petitioner, he would give a perfunctory answer since "nobody dared to withhold any answers." Petitioner did not otherwise participate actively at these meetings (R. 94).[4]

[4] In May 1962, when asked by an officer of the Immigration and Naturalization Service if he had ever attended any open Party meetings, petitioner answered (R. 252):

"In the medical school they were not meetings. The whole

In 1949, while still a student in the medical school, petitioner joined the Hungarian army as a member in the Army College of Medical Students, having been "more or less ordered" to do so (R. 95–96). It was not necessary to be a Communist to enter the army (R. 96). Thereafter, the army provided petitioner with free tuition, board, and medical books, which he needed to complete his education (R. 96–97). Upon his graduation in June 1952, he was commissioned as a medical officer with the rank of first lieutenant (R. 97–98). At about the same time he married Magdalena Retsagi, a classmate at the school whom he had first met in 1948 and whom he had begun seeing steadily in late 1949 or early 1950 (R. 89–98). The wedding ceremony was both civil and religious, although religious ceremonies were then frowned upon (R. 98).

Petitioner thereafter served in the army as a medical officer (R. 97). He stated that while in the army he attended indoctrination courses in Marxism-Leninism, but that these courses were required "just as marksmanship or strategy or tactics for every person in the army including medical officers" (R. 98–99).

At the time of the Hungarian uprising in October and November of 1956, petitioner was attached as a medical officer to an anti-aircraft division in Budapest (R. 100, 108). He was then a captain, having received an automatic promotion after three years' service (R. 97). Petitioner's unit, along with most other units

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school came together and talked about the Russian Revolution and I was there too. As years went by the meetings were held more open."

of the Hungarian army, turned against the Russian forces sent to suppress the rebellion (R. 108). Petitioner, although he did not bear arms, was engaged with the treatment of the wounded (R. 107–108). When the uprising was effectively crushed by Russian troops, he and his wife began to seek ways of leaving Hungary (R. 100). Shortly thereafter he and his wife successfully eluded the Russian guards and crossed the border into Austria (R. 101). A week later, they were flown to the United States (R. 102–103). Petitioner and his wife were admitted to permanent residence in the United States in December 1956 (R. 103). They have been continuously employed in various hospitals as interns, residents, and licensed physicians (R. 103–105). Both successfully passed their State board examinations in Massachusetts, Illinois, and Virginia (R. 104). In addition, petitioner had become a certified diplomate in anesthesiology. For some time prior to July 1964, he had been a senior instructor at the Tufts University Medical School. At the time of his hearing he was in private practice and testified that he was expecting an appointment to the staff of the Harvard Medical School (R. 105).

Petitioner's wife, Magdalena Retsagi Berenyi, whose petition for naturalization was pending before the court at the same time and was heard jointly with his, testified on his behalf as well as her own. She stated that she had never been a Communist (R. 112, 114, 123, 127), nor had her husband (R. 127). She testified that her father had been a wealthy, senior executive in a Hungarian textile manufacturing firm (R. 114), who had come to the United States with his

wife and youngest children in 1948 (R. 111–112, 118). As the witness was then over the age of eighteen, she was not permitted to accompany them (R. 112–113, 118). When the funds left for her by her father ran out in 1950, she joined the army in order to finance the remainder of her medical education (R. 111, 115). After the 1956 uprising had been suppressed, she and petitioner, together with her aunt and uncle, had fled to Austria (R. 118–120).

Four other witnesses were called by petitioner to testify to his opposition to Communism. Dr. Ilona Ring, a physician and naturalized citizen living in Philadelphia (R. 77–84), stated that she first met petitioner and his future wife in 1949 or 1950, and during the following two years saw them socially about once a month (R. 79–82, 86). On those occasions, and on subsequent occasions, they frequently discussed the country's political situation (R. 80–83). In those discussions petitioner never said that he was a member of the Communist Party (R. 81–82, 85) and "was very much against the Communist regime" (R. 81–83).

Lorand De Bickish, an engineer and naturalized citizen living in Massachusetts (R. 130, 139–140), testified that he first met petitioner about 1950 (R. 136), and thereafter saw petitioner socially at least once a week (R. 137–138). On most of these occasions they discussed politics (R. 137–138), and petitioner "always spoke very much against the Communist Government, the Communist Party, against the life in Hungary at that time" (R. 137–138).

Mrs. Paulette Farkas, the aunt of petitioner's wife, first met petitioner in 1950 (R. 149–150). She testified that petitioner never said anything in favor of Communism and frequently spoke of his dislike of the Communist regime and of his desire to leave the country (R. 150). Petitioner's mother-in-law testified that since coming to this country petitioner had expressed his dislike of Communism (R. 143–145).

3. From the foregoing testimony and the record of the preliminary examination, the district court concluded that the evidence was too meager to warrant a finding that petitioner continued to be a member of the Communist Party within the ten-year period immediately preceding the filing of the petition (R. 275), and that naturalization was, therefore, not barred by Section 313(c) of the Act. On the other hand, the court also concluded that petitioner had failed to establish that during the five-year period preceding the filing of the petition he had been a person of good moral character, as defined in Section 101(f)(6), and that the petition must therefore be denied under Section 316(a) (R. 277).[5] The court reached this conclusion because it found that in his "Application to File Petition for Naturalization" (R. 243–246) filed on January 30, 1962, and in statements to officers of the Immigration and Naturalization Service on February 2, 1962,[6] and May 22, 1962 (R. 248–254) petitioner, for the purpose of facilitating his

[5] Mrs. Berenyi's petition, which was before the court at the same hearing, was granted.

[6] The court apparently was referring to the statement of February 19, 1962 (R. 298–299).

naturalization, falsely swore that he had never been a member of the Communist Party, knowing that such statements were false (R. 275–276). In particular, the court found (R. 274–275) that petitioner became a member of the Communist Party in Hungary in 1945; that he remained a member of the Communist Party for an indefinite number of years; that he attended closed meetings of the Communist Party; that he was in charge of instruction in Communist ideology at student study group meetings for an undetermined period of time; that he entered the Hungarian army, which was then under Communist control, in 1949, and thereafter served as a medical officer; that he did not participate in the 1956 uprising against Russian domination, but, in the resulting confusion, fled with his wife and others into Austria. The court of appeals, in affirming the district court's order, stated that it had carefully reviewed the entire record and that, according due weight to the opportunity of the district court to observe the witnesses, it could not hold the district court's finding that petitioner had been a Communist to be clearly erroneous (R. 307–308).

ARGUMENT

INTRODUCTION AND SUMMARY

Under Section 316(a) of the Immigration and Nationality Act (8 U.S.C. 1427(a)), an alien who seeks naturalization as a United States citizen must establish, *inter alia,* that during the five years preceding the filing of his petition he has been "a person of good moral character." Under Section 101(f)(6) of the

Act (8 U.S.C. 1101(f)(6)), no person may be found to be a person of good moral character who, within that period, "has given false testimony for the purpose of obtaining any benefits" under the Act. Petitioner was denied naturalization because the district court found that he had given false testimony in repeatedly representing under oath that he had never been a member of the Communist Party of Hungary.[7]

Petitioner does not contend that Sections 316 and 101 are constitutionally defective or that he may not be obliged to answer truthfully questions concerning past relations with the Communist Party here or abroad. Nor does he deny that, as a petitioner for naturalization, he bore the burden of persuading the district court that he satisfied each of the conditions for naturalization, including that of good moral character. Petitioner makes only two contentions here: (1) that there was clear error in the finding of fact that he had given false testimony by denying Communist Party membership, and, in the alternative, (2) that, if he was a member of the Communist Party, his association was not shown to be sufficiently meaningful, as that term is used in *Rowoldt* v. *Perfetto*, 355 U.S. 115, and *Gastelum-Quinones* v. *Kennedy*, 374 U.S. 469.

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[7] Petitioner is not, of course, permanently barred from acquiring citizenship. Indeed, as the spouse of an American citizen, he can reapply for citizenship three years after his wife's naturalization, and must then prove that he was of good moral character only for that three-year period. Sec. 319 of the Immigration and Nationality Act, 8 U.S.C. 1430; 8 C.F.R. § 319.1.

Petitioner's attack on the sufficiency of the evidence supporting the finding that he was a member of the Communist Party is addressed to a narrow issue as to which there was sharply conflicting testimony. We urge below that the district court's resolution of that conflict should not be set aside by this Court. In reaching that conclusion we rely on two propositions. First, we show that the burden of persuasion (or the risk of non-persuasion) was borne by the petitioner, so that the district court's doubts, if any, as to which version of the facts was to be believed, were properly to be resolved in favor of the government. Secondly, we show that, where a trial judge has determined that some testimony merits more credence than other testimony, considerable weight is to be given to his opportunity to judge the credibility of the witnesses and that his choice between conflicting evidence cannot in itself constitute clear error. We also contend that, in view of the affirmance of the district court's findings by a unanimous court of appeals, this Court should adhere to its well established rule that, except in extraordinary cases, it will not upset findings of fact concurred in by two courts below.

Petitioner's alternative argument—that there was no showing that his membership in the Communist Party was sufficiently meaningful—is based on a misinterpretation of the basis for the denial of his petition. We show below that the petition here was not denied because of petitioner's past or present political affiliations; naturalization was withheld solely because petitioner was found to have given false testimony and was therefore not a person of good moral char-

acter. Since the only question was the truthfulness of petitioner's representations, the meaningfulness of his membership is quite beside the point.

I

THE FINDING OF THE DISTRICT COURT THAT PETITIONER HAD GIVEN FALSE TESTIMONY WAS NOT CLEARLY ERRONEOUS.

The district court's ultimate finding, that petitioner had given false testimony, followed inevitably from its subsidiary finding, that petitioner had been a member of the Communist Party. The latter finding in turn involved an assessment of the sharply conflicting testimony of Dr. Kury and petitioner, and an appraisal of the relative credibility of those two witnesses. The testimony of petitioner's friends and relatives to the effect that petitioner had at various times expressed his hostility to Communism was not really in conflict with the testimony of the government witnesses that petitioner was a Party member. The government's evidence tended to show that petitioner's membership was prompted by considerations of convenience and pragmatism in the coercive atmosphere of a Communist regime rather than by personal commitment and ideological conviction (see, *e.g.*, R. 189, 269). This view gains persuasiveness from the testimony of petitioner (R. 92–94, 253–254), as well as that of Dr. Kury and Dr. Halasz (R. 22, 24–25, 30, 171, 187, 191, 259), concerning the very substantial pressures in Hungary toward political conformity, the serious difficulties that could be created for those who overtly resisted such pressures, and the Party's special efforts to gain the adherence of outstanding

students like petitioner. It is in light of those pressures that one can understand the testimony of Dr. Halasz, who was clearly trying to be as circumspect as possible, that he had considered petitioner to be a fellow Party member, even though not a communist at heart (R. 35, 183–185, 189, 266, 269–270).

Since nothing in the government's evidence was patently incredible, the district court could not avoid a choice between the conflicting versions of the critical fact. Because petitioner bore the burden of persuasion, and because substantial weight is to be given to the opportunity of the trial court to judge the credibility of the witnesses, we believe that the court's resolution of the conflict, affirmed by a unanimous court of appeals, should not be set aside in this Court.

It is well established, and we do not understand petitioner to deny (see Br. 20), that a person seeking naturalization bears the burden of proving that he meets all of the statutory conditions for the grant of citizenship. As Mr. Justice Brandeis wrote for the Court in *Tutun* v. *United States,* 270 U.S. 568, 578:

> The applicant for citizenship, like other suitors who institute proceedings in a court of justice to secure the determination of an asserted right, must allege in his petition the fulfilment of all conditions upon the existence of which the alleged right is made dependent; and he must establish these allegations by competent evidence to the satisfaction of the court. * * *

In this respect, naturalization proceedings are of course to be distinguished from denaturalization and deportation proceedings in which the government bears the burden of proof. Where the initial grant of

citizenship is sought, this Court has repeatedly said, doubts "should be resolved in favor of the United States and against the claimant." *United States* v. *Manzi*, 276 U.S. 463, 467; *United States* v. *Schwimmer*, 279 U.S. 644, 649–650; *United States* v. *MacIntosh*, 283 U.S. 605, 626. See also *Taylor* v. *United States*, 231 F. 2d 856 (C.A. 5); *Brukiewicz* v. *Savoretti*, 211 F. 2d 541 (C.A. 5); *Stevens* v. *United States*, 190 F. 2d 880, 883 (C.A. 7); *Molsen* v. *Young*, 182 F. 2d 480, 482 (C.A. 5), reversed on other grounds, 340 U.S. 880; *United States* v. *Harbanuk*, 62 F. 2d 759 (C.A. 2); *In re Nybo*, 42 F. 2d 727 (C.A. 6); *In re Sittler's Petition*, 197 F. Supp. 278, 286–287 (S.D. N.Y.), affirmed, 316 F. 2d 312 (C.A. 2) certiorari denied, 376 U.S. 932; *Petition of Reginelli*, 20 N.J. 266, 119 A. 2d 454, certiorari denied, 351 U.S. 918.

As the court of appeals recognized (R. 307), petitioner's sworn application made out a *prima facie* case that he was in compliance with the requirements for naturalization. That *prima facie* case shifted to the government the burden of going forward with the evidence. The government in turn met its burden with testimony which cast petitioner's truthfulness into doubt. But while the burden of producing evidence was thus shifted, the burden of persuasion (or the risk of nonpersuasion) did not shift. See McCormick, *Evidence* (1954) Section 307. When both sides rested, that burden or risk rested on petitioner. Therefore, if the fact-finder was persuaded by the government's evidence, or if his mind was in doubt, he was obliged to deny the petition.

The trial court had before it not only the record of the preliminary examination but also the live testimony of all of the witnesses. Indeed, petitioner's counsel insisted that the government present its testimony in open court and not rely on the administrative record (R. 13–15). Moreover, the district court expressly disclaimed any reliance on the summary of the preliminary examination or the findings of fact, conclusions of law, and recommendations of the examiner (R. 274). Thus, unlike many naturalization proceedings in which all the evidence is documentary, neither the court of appeals nor this Court stand "in the same position as did the district judge in passing upon whether the petitioner carried his burden of proof." *Krausse* v. *United States,* 194 F. 2d 440, 441 (C.A. 2). In these circumstances, the mandate of the Federal Rules of Civil Procedure applies with fullest force: "Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses" (Rule 52(a)).

"On the basis of a careful review of the entire record" (R. 307), the court of appeals could not find the clear error requisite for reversal (R. 308). Nor would such a finding be warranted on the record under this Court's characterizations of the "clearly erroneous" standard. Surely the record of conflicting testimony in this case does not produce "the definite and firm conviction that a mistake has been committed." *United States* v. *Gypsum Co.,* 333 U.S. 364, 395. And if it were supposed that "the evidence would support a conclusion either way," the trial

court's "choice between two permissible views of the weight of evidence is not 'clearly erroneous.'" *United States* v. *Yellow Cab Co.*, 338 U.S. 338, 342.

Finally, petitioner's invocation of the "clearly erroneous" rule here must be considered in light of the Court's repeated pronouncement that it "cannot undertake to review concurrent findings of fact by two courts below in the absence of a very obvious and exceptional showing of error." *Graver Tank & Mfg. Co.* v. *Linde Air Products Co.*, 336 U.S. 271, 275. The evidence in this case has now been reviewed by two courts and four judges. However closely balanced the evidence might be thought, surely no "obvious and exceptional showing of error" has been made. Moreover, no right of constitutional dimension has been claimed. Compare *United States* v. *Appalachian Electric Power Co.*, 311 U.S. 377, 403–404. We believe, therefore, that the Court should adhere to the "seasoned and wise rule * * * [that] makes concurrent findings of two courts below final here in the absence of very exceptional showing of error." *Comstock* v. *Group of Investors*, 335 U.S. 211, 214.

II

THE MEANINGFULNESS OF PETITIONER'S ASSOCIATION WITH THE COMMUNIST PARTY IS NOT RELEVANT TO THE TRUTHFULNESS OF HIS TESTIMONY

Petitioner contends (Br. 28–31) that even if he was a member of the Communist Party, the denial of his petition must be reversed because his membership was not shown to be sufficiently meaningful, as that term is used in *Rowoldt* v. *Perfetto*, 355 U.S. 115, and

Gastelum-Quinones v. *Kennedy*, 374 U.S. 469. This argument obscures the basis of the decision below. The conclusion that petitioner failed to establish the "good moral character" required under Section 316 of the Act was not based on any finding as to his past or present ideological convictions or political activities; it was based on the finding that he had testified falsely. While there might be merit in petitioner's argument had his petition been denied under Section 313, which bars the naturalization of persons who have been members of the Communist Party within the preceding ten years unless it is shown that such membership was involuntary,[8] it is quite clear that the petition was denied under Sections 101(f)(6) and 316(a), which bar the naturalization of anyone giving false testimony for the purpose of obtaining any benefits under the Act. Indeed, in light of the district court's finding that the evidence did not show that petitioner had been a member of the Communist Party within the preceding ten years (R. 275), nothing in the Act would have precluded the grant of the petition had he testified truthfully. Thus, while *Rowoldt, supra,* and *Gastelum-Quinones, supra,* involved the deportation of aliens by reason of their conceivably hostile political attachments, this case in-

[8] Section 313(d) exempts those who show "* * * that such membership or affiliation is or was involuntary, or occurred and terminated prior to the attainment by such alien of the age of sixteen years, or that such membership or affiliation is or was by operation of law, or was for purposes of obtaining employment, food rations, or other essentials of living and where necessary for such purposes."

volves the denial of naturalization to an alien solely by reason of his lack of truthfulness.

Petitioner was asked whether, "in the United States or in any other place, [he had] been a member of, or in any other way connected with, or associated with the Communist Party either directly, or indirectly through another organization, group, or person" (R. 244). He answered that question in the negative (R. 244; see also 252, 299). Petitioner is a highly intelligent and highly educated person (R. 26). He does not, and could not readily, contend that even a nominal or involuntary membership did not require an affirmative answer. He does not suggest that the question is one which may not properly be put, nor that Congress may not insist on truthful answers from those who seek citizenship. See Section 101 (f)(6). In all events, "[w]hen one undertakes to cheat the Government or to mislead its officers, * * * by false statements, he has no standing to assert that the operations of the Government in which the effort to cheat or mislead is made are without constitutional sanction." *Kay* v. *United States,* 303 U.S. 1, 6; *Dennis* v. *United States,* 384 U.S. 855, 864–867. In sum, since neither the congressional insistence on truthful representations nor the denial of the petition turn on the political implications of "the dominating impulse to [petitioner's] 'affiliation' with the Communist Party" (*Rowoldt, supra,* at 120), the "meaningful association" standard has no bearing in this case.

CONCLUSION

For the reasons stated, it is respectfully submitted that the judgment of the court of appeals should be affirmed.

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